No. 76-1143

Supreme Court of the United States

RAY MARSHALL, SECRETARY OF LABOR, ET AL.,
Appellants

v.

BARLOW'S INC.,
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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This brief *amicus curiae* is filed in support of the position of appellants by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with the consent of the parties, as provided by Rule 42 of the Rules of this Court.

INTEREST OF THE AMICUS CURIAE

The AFL-CIO is a federation of 109 national and international labor unions, having a total membership of approximately 14,000,000 working men and women. The Occupational Safety and Health Act of 1970 ("OSHA") was passed, with the active support of the AFL-CIO, to protect workers such as those represented by AFL-CIO affiliates from avoidable injury and illness incurred on the job. The decision of the court below, if upheld, would, in our view, render it impossible for the Secretary of Labor effectively

to enforce OSHA, and thereby endanger the health and safety of millions of American workers. We therefore take this opportunity to present to the Court our view that the inspection scheme contemplated by Congress is not unconstitutional.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Occupational Safety and Health Act ("OSHA") is a landmark statute enacted in 1970 to correct "the worst problem confronting American workers" (H.R. Rep. No. 91-1291, 91st Cong., 2d Sess., 14(1970),—injuries, illnesses, and deaths resulting from correctable health and safety hazards at places of employment. To insure compliance with the Act's substantive provisions, Congress provided the Secretary of Labor with the authority to inspect any "area, workplace or environment where work is performed by an employee." (Section 8(a), 29 U.S.C. § 657(a).) This case involves two separate questions concerning whether the Fourth Amendment proscribes the inspection system which Congress has authorized.

The first issue is whether the Fourth Amendment warrant requirement applies to these circumstances. As this Court has reiterated often in recent years, the Fourth Amendment protects against governmental intrusion into reasonable expectations of privacy. Principles of trespass or property rights are not relevant to Fourth Amendment analysis. Thus, while it is plain that employers have a property right in their businesses and in the locations in which work is performed by employees, and equally plain that businesses as such are not outside the protection of the Fourth Amendment, those two facts alone do not establish that an employer has a protectable expectation of privacy

as to all governmental entry onto any business location. In this instance, the employer has opened his premises for commercial purposes to certain persons—his employees. The question is whether he has retained, nonetheless, a sufficient expectation that government officials may not intrude into the very locations, and only the locations, where those employees work, for the limited purpose of protecting those employees from physical harm, under a statutory and regulatory scheme which assures that the inspection will be limited to that purpose. We do not believe the OSHA inspection scheme involves any meaningful intrusion into a legitimate expectation of privacy, and we submit that the protections contained in the statute itself are therefore sufficient under the Fourth Amendment.

The second question is whether, if the expectation of privacy is of significant dimensions, the scheme of routine, unannounced inspections which Congress prescribed is nonetheless constitutional. The court below addressed only this issue, and did so on the premise that the central problem was whether a warrant based on particularized probable cause must be obtained prior to inspection, at least if there is no consent.[1] Because of the difficulty of assuring uniform compliance in any other manner, routine, unannounced in-

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[1] This assumption was never made explicit. However, the complaint was based on the premise that no valid search could take place without "information giving [the inspectors] probable cause to believe that any violations of the Act existed upon or were occurring within plantiff's said business premises." (App. 6; see also Complaint ¶ XIV, App. 8.) And, if the only issue were whether *some* judicial approval and notice of the inspection, evidenced in writing, is necessary, there would have been no justiciable controversy, since the suit was filed *after* an inspection pursuant to court order was attempted.

spections were contemplated by Congress and central to the statutory scheme.[2] But, contrary to the lower court's assumption, even if warrants were necessary, such periodic inspections could continue. For, under *Camara* v. *Municipal Court*, 387 U.S. 523, and *See* v. *Seattle*, 387 U.S. 541, the showing necessary to obtain a warrant in these circumstances would be only whether there was a rational scheme for determining which businesses are to be subjected to routine inspections. Since the Secretary would have no difficulty in demonstrating such a rational scheme, requiring warrants would not fundamentally alter the statutory in-

Further, the district court held that the OSHA inspection scheme was entirely unconstitutional; in suggesting that there are alternative means of enforcing OSHA, the court did *not* intimate that warrants could be obtained by showing the need to perform a routine inspection, rather than a reason to believe there are violations in the particular location. (Jurisdictional Statement, Appendix A, 7a-8a n. 4 (hereafter "Jur. St. App.").) Thus, the case was clearly decided on the basis that if warrants are necessary, the scheme of routine inspections cannot go forward at all.

[2] We note that this case does not concern inspections triggered by an employee complaint (§ 8(f), OSHA, 29 U.S.C. § 657(f)), or by any other reason to believe a violation exists at a particular locality. The Department of Labor refers to routine inspections as "regional programmed inspections;" it also conducts other kinds of inspections, based upon evaluation of complaints, knowledge of actual injuries, or as a follow-up after citation for violations. (See Occupational Safety and Health Administration, Field Operations Manual, 2 BNA Occupational Safety & Health Reporter Reference File (hereafter "Manual"), at 77:2301; 75:2501; 77:2510.) The basic considerations regarding intrusion upon protected interests would, of course, be basically the same for all the types of OSHA inspections. However, the very routine nature of programmed inspections, and the consequent lack of stigma involved, could conceivably decrease the intensireness of such inspections and thereby reduce the degree of protection required by the Fourth Amendment. (See *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 559-560.)

tent. This Court should therefore, if it determines warrants are required, read the statute so as to render it constitutional.

ARGUMENT

I. The Fourth Amendment Does Not Require The Government To Obtain Warrants In Order To Conduct OSHA Inspections Of Areas Where Employees Work, For The Protection Of Those Employees.

The Fourth Amendment "protects people from unreasonable governmental instrusions into their legitimate expectations of privacy." (*United States* v. *Chadwick*, —— U.S. ——, 45 L.W. 4797 (June 21, 1977).) Whether or not a particular kind of search involves a significant intrusion into privacy expectations is, under this formulation, relevant at two junctures. First, if there is no intrusion upon a protectable privacy interest, the Fourth Amendment inquiry is at an end. (See, e.g. *Air Pollution Variance Bd.* v. *Western Alfalfa*, 416 U.S. 861, 865; *G.M. Leasing Corp.* v. *United States*, —— U.S. ——, 45 L.W. 4098, 4102 (Jan. 12, 1977).) Second, the privacy interest if it exists may be minimal, either because of the nature of the location being searched or thing being seized (see, e.g., *South Dakota* v. *Opperman*, 428 U.S. 364, 367; *United States* v. *Chadwick*, *supra*, 46 L.W., at 4800), or because of the limited nature of the intrusion. (See, e.g., *Terry* v. *Ohio*, 392 U.S. 1.) If so, a search or seizure may be "reasonable" which, if the intrusion were greater, would violate the Fourth Amendment.

1. To evaluate the strength of a privacy interest for Fourth Amendment purposes, the starting point is that "the Fourth Amendment protects people, not places." (*Katz* v. *United States*, 389 U.S. 347, 351.) Consequently, notions of property rights or trespass have no application

in the Fourth Amendment area. (*Western Alfalfa, supra; Hester* v. *United States*, 265 U.S. 57.) For, "[w]hat a person knowingly exposes to the public, *even in his own home or office*, is not a subject of Fourth Amendment Protection." (*Katz, supra*, 389 U.S., at 351 (emphasis supplied).)[3]

If Barlow's Inc. has a Fourth Amendment right to be free from OSHA inspections, then, neither its ownership of the building in which work is performed nor its control of the business can be the basis of that right. For example, if an OSHA inspector walked around the aisles of a department store during business hours looking for readily visible OSHA violations, clearly no Fourth Amendment search would have taken place at all. "[O]nce it is recognized that the Fourth Amendment protects people—and not simply 'areas'—* * * it becomes clear that the reach of the Amendment cannot turn on the presence * * * of a physical intrusion into any given enclosure." (*Katz, supra*, 389 U.S., at 353.)

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[3] The court below, and other courts addressing the OSHA inspection question, have viewed *Western Alfalfa* as based on an "open fields" *exception* to the warrant requirement. (See Jur. St. App., 9a; *Dunlop* v. *Hertzler Enterprises, Inc.*, 418 F. Supp. 627, 631 & n.9 (D. N.Mex.); cf. *Brennan* v. *Gibson's Products, Inc.*, 407 F. Supp. 154, 161 (E. D. Tex.).) Taking this view, those courts assumed that the apparent obverse was also true—that is, that any health or safety inspection *inside* a building requires full Fourth Amendment protection. However, the reason why there was no Fourth Amendment violation in *Western Alfalfa* was not a special exception to the warrant requirement but, instead, that the emissions which were monitored, although observed from private property, were "knowingly expose[d] to the public" (*Katz, supra*), and there was therefore no search at all. (See *United States* v. *Dionisio*, 410 U.S. 1, 14; *Nixon* v. *Administrator of General Services*, —— U.S. ——, ——, 45 L.W. 4917, 4926 (June 28, 1977).)

2. Ownership of a business alone, then, does not give rise to a protectable privacy interest as to all locations at which the business operates. At the same time, "[t]he businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." (*See* v. *Seattle*, 387 U.S. 541, 543.) Thus, in some cases, all involving locked premises or offices, the Court has held that there is a privacy interest in commercial premises sufficient to necessitate a warrant. (See, e.g., *See, supra; G.M. Leasing Corp., supra;* cf. *Mancusi* v. *De Forte*, 392 U.S. 364.)

However, because of the inherent nature of commercial enterprise, the Fourth Amendment rights of the businessman and of an occupant of a private residence are not the same. "The Court * * * has recognized that a business, by its special nature and voluntary existence, may open itself to intrusions that would not be permissible in a purely private context," (*G.M. Leasing Corp., supra*, 45 L.W., at 4103), and that "neither incorporated nor unincorporated associations can plead an unqualified right to conduct their affairs in secret." (*California Bankers Assn.* v. *Shultz*, 416 U.S. 21, 66-67.) Thus, "businesses may * * * be inspected in many more situations than private homes." (*See, supra*, 387 U.S., at 546.; see *United States* v. *Biswell*, 406 U.S. 311; *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72.)[4]

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[4] In *Biswell*, a locked gun storeroom was the object of the inspection. *Colonnade Catering Corp.* involved a locked liquor storeroom; while the inspectors also visited the party room open to the public and an apparently unlocked cellar, no objection was even raised until they sought entry to the storeroom, which only the president of the company was authorized to open. (397 U.S., at 73.) In no

In explicating the situations in which business privacy is to be respected for Fourth Amendment purposes, this Court has recently dealt only with two situations. On the one hand, a businessman dealing in regulated items has been held to have "only limited justifiable expectations of privacy" (*Biswell, supra,* 406 U.S., at 316) as to locations in which he keeps those items, even if he evidences a subjective expectation of privacy as to those locations by locking them and permitting no access to anyone else.[5] On the other hand, if an intrusion happens to be upon a business, but is "not based upon the nature of its business, its license, or *any* regulation of its activities [there is] no justification for treating petitioner differently in these circumstances simply because it is a corporation." (*G.M. Leasing Corp., supra,* 45 L.W., at 4103.)

Plainly, unlike *G.M. Leasing Corp.* and *See*,[6] this case *does* involve regulation of a business as such. Only persons "engaged in a business affecting commerce who has employees" are covered by the Act. (§ 3(5), 29 U.S.C. § 652 (5).) And, the statute was passed because Congress found "that personal injuries arising out of work situations im-

case, to our knowledge, has the Court discussed Fourth Amendment rights with respect to commercial locations which are neither offices nor locked storage premises.

[5] For private persons, locking or closing off an area, even for a limited time, is ordinarily sufficient evidence of an intent not to expose the contents to trigger complete Fourth Amendment protection. (*Katz, supra,* 389 U.S., at 352; *Chadwick, supra,* 45 L.W., at 4800.)

[6] The inspection in *See* was a fire inspection, under a general statute permitting inspections of buildings for compliance with the Fire Code. (387 U.S., at 541.)

pose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments." (§ 2(a), 29 U.S.C. § 651(a).) Congress pointed, in particular, to the fact that lack of uniform regulation of occupational health and safety made it difficult for those employers who are concerned about their employees' health to implement that concern with proper precautions. "[M]any employers * * * simply cannot make the necessary investment in health and safety, and survive competitively, unless all are compelled to do so." (S. Rep. No. 91-1282, 91st. Cong., 2d Sess. (1970), 4.) Thus, the burden of OSHA does not fall on businesses only incidentally, but was required precisely because participation by businesses in the public marketplace creates, absent government regulation of occupational health and safety, a disincentive to self-regulation ultimately harmful to the general economy.

Not only is this statute aimed at aspects of business operations which are public, rather than private, but the inspections are aimed at the particular areas which, although they may not be open to *any* member of the public who seeks to enter, are open to "representatives of the public"—the employees. (*Youghiogheny & Ohio Coal Co.* v. *Morton*, 364 F. Supp. 45, 50 (S. D. Ohio).) Since "employees, whose interests are protected by the Act, enter the [business premises] daily, * * * [f]ederal inspectors [enforcing that Act] do not * * * intrude into [a] zone of privacy which the [employers] reasonably expect to remain inviolate." (*Id.*)

The relationship between employers and their employees has long been recognized as an essentially commercial one affecting the public economy. Employers therefore, unlike individuals as regards their own homes and families, are

subject to pervasive regulation as regards their dealing with their employees.[7] In particular, employees and their representatives have in certain instances the right to use the employer's property over the employer's objection when necessary to exercise their statutory rights. "[T]he employer's right to control his property does not permit him to deny access to his property to persons whose presence is necessary there to enable the employees effectively to exercise their right to self-organization and collective bargaining * * *." (*Republic Aviation Corp.* v. *Board*, 324 U.S. 793, 802 n. 8; see also *Hudgens* v. *NLRB*, 424 U.S. 507, 521-523.) Thus, the decision to engage in commerce and to hire employees necessarily entails a diminution of the absolute right to control entry onto and use of the employer's otherwise private premises where protection of the employees is at issue.

The significance of the public nature of the employee-employer relationship, and therefore of the location where employees work, can be seen more clearly if one considers the different considerations which would apply in other circumstances. For example, if a governmental body tried to regulate health and safety of children in their homes, by providing for routine home inspections to assure compliance with child health and safety standards, the public interest in assuring the health and safety of children would be at least as great as that in assuring that adults are not harmed while working. The relationship of children and

[7] See, e.g., the Fair Labor Standards Act, 29 U.S.C. 201 et seq.; the National Labor Relations Act, 29 U.S.C. § 151 et seq.; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.; the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq.; and the Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq.

parents, however, is subject to substantive constitutional protection against government regulation. (See, e.g., *Moore* v. *City of Cleveland*, ——. U.S. ——, 45 L.W. 4524 (May 31, 1977).) And, health and safety inspection of homes for protection of the homes' occupants would involve governmental perusal of the most intimate aspects of daily life. We would assume, therefore, that even if the regulation was otherwise valid, particularized probable cause and a warrant would be necessary to permit inspections.

In contrast, we would expect that even in buildings which serve as residences, landlords who maintain common areas for the use of residents and their guests could not object to routine health and safety inspection of those areas:

> "Inspection of the common areas of multiple-dwelling buildings infringes only the technical property interest conferred by the landlord's legal possession of these areas. Because such inspections threaten no invasion of landlord's personal privacy, the Fourth Amendment does not dictate the same careful procedures required to protect the privacy of citizens in their own houses." (Comment, *The Fourth Amendment and Housing Inspections*, 77 Yale L.J. 521, 539-540 (1970).)

This analysis would apply, we would think, to inspections for the protection of customers of areas open for commercial purposes, even though the property owner retained the right to limit entry to some degree. For example, the fact that a restaurant can set and enforce behavior and dress rules for customer, or that a theatre can admit only those who pay in advance, would not change the fact that their premises are open to the public to an extent, for commercial purposes. An inspection limited to protecting those members of the public who *are* admitted would therefore not intrude upon any legitimate expectation of privacy,

although it would intrude upon technical property rights.

3. Because he is in business and has hired employees for that purpose, then, an employer cannot have any legitimate expectation that his relationship with his employees and the area where they work will be free from governmental inspection. But, this is not to say that by hiring employees, the employer surrenders *all* reasonable expectations of privacy as to the premises where they work with respect to *every* kind of search or inspection. Rather, the compelling factor in this case, we believe, is that the scope of an OSHA inspection is exactly congruent with the degree to which and the manner in which the employer has opened his premises to others for commercial purposes. Thus, inspections are ordinarily conducted only during business hours, when employees are present (Manual, at 77:2502-2503),[8] and the inspection is limited to areas, materials, and machines with which employees have contact, and records directly relevant to the purpose of the inspection. (29 C.F.R. § 1903.3 (a).)[9]

[8] In those few instances in which inspections occur outside of working hours, a situation not presented by this case, the time must still be a "reasonable" one (§ 8(a)(2), OSHA); approval by the OSHA Area Director is ordinarily required; and notice may be given to the employer in advance. (Manual, at 77 :2505; see 29 C.F.R. § 1903.6.) Because many OSHA standards involve the use of protective equipment or safe procedures by employees, or the measurement of toxic substances under actual working conditions, OSHA inspectors would almost always prefer to inspect during working hours. Thus, it is likely that out-of-business hours inspections occur primarily to decrease the intrusion on the employer where the work performed is such that business-hours inspections would be too disruptive. (See 29 C.F.R. § 1903.7(d).)

[9] It does not appear that OSHA inspectors are empowered to physically search offices or desks to inspect records if the employer does not produce them upon request. (See § 8(e)(1), 29 U.S.C. § 657(e)(1).) Rather, compulsory judicial process commanding production of the records is sought upon refusal. (Manual, at 77:2503.)

The reason this consideration is critical is that the Fourth Amendment protects privacy to the degree that the person seeking to avoid governmental intrusion has himself served his "right to be let alone." (*Olmstead* v. *United States*, 277 U.S. 438, 478 (Brandeis, J., dissenting).)[10] And, the nature of certain activities or locations may be such that certain kinds of searches or inspections deal with the public or shared aspect of the activity and therefore do not implicate legitimate expectations of privacy, while others will intrude upon privacy to the extent it has been preserved.

The recent automobile search cases illustrate this principle. While this Court has recognized that automobile travel is "public" in certain ways and has therefore announced that "a diminished expectation of privacy * * * surrounds the automobile," (*Chadwick, supra*, 45 L.W., at 4800), this recognition has not led to a generalized rule that Fourth Amendment protections do not apply with full force to automobiles. Rather, the degree of protection accorded has been tuned to whether the purpose and scope of the intrusion is limited to those aspects of automobile use which are public

[10] For example, while "[t]he Fourth Amendment protects against governmental intrusion upon 'the sanctity of a man's home and the privacies of life' * * * the occupant can break the seal of sanctity and waive his right to privacy in the premises. Plainly he does this to the extent he opens his home to the transaction of business and invites anyone willing to enter to come in to trade with him. [T]he seller cannot * * * complain that his privacy has been invaded so long as the agent does no more than buy his wares." *United States* v. *Lewis*, 385 U.S. 206, 213 (Brennan, J., concurring). Compare *Gouled* v. *United States*, 255 U.S. 298. See also *United States* v. *Miller*, 425 U.S. 435, 442-443.

in nature. "The degree of invasion of privacy of an automobile search may vary with the circumstances." *United States* v. *Ortiz*, 422 U.S. 891, 898. For example, in holding that the roving Border Patrol officers may not stop cars away from the border to inspect for aliens without complying with the reasonable suspicion standard of *Terry* v. *Ohio*, 392 U.S. 1, the Court noted:

> "Our decision in this case takes into account the special function of the Border Patrol • • • [and] the character of roving-patrol stops. Border Patrol agents have no part in enforcing laws that regulate highway use, and their activities have nothing to do with an inquiry whether motorists and their vehicles are entitled, by virtue of compliance with laws governing highway use, to be on public highways. Our decision thus does not imply that state and local enforcement agencies are without power to enforce laws regarding drivers' licenses, vehicle registration, truck weights, and similar matters." (*United States* v. *Brignoni-Ponce*, 422 U.S. 873, 883 n.8; see also *id.*, at 887 (Rehnquist, J. concurring); *United States* v. *Ortiz*, 422 U.S. 891, 897 n.3).

Also illustrative, in a different way, are cases dealing with shared control over otherwise private premises. Where more than one person uses an area, either may consent to a search. (*United States* v. *Matlock*, 415 U.S. 164; *Frazier* v. *Cupp*, 394 U.S. 731, 740.) Since "the scope of a search that consent legitimates is congruent with the realm of privacy that the consent waives" (Weinreb, *Generalities of the Fourth Amendment*, 42 U. Chi. L. Rev. 47, 54 (1974)), these cases illustrate that "the Constitution does not allow persons who have a privacy limited by sharing to claim a privacy beyond that limit." (*Id.*, at 59.) At the same time, just as a "search must be strictly tied to and justified by the circumstances which rendered its initiation possible" (*Terry*, *supra*, 392 U.S., at 19), a governmental intrusion which is not a search because limited to the shared aspects of an area must be surrounded with protections to assure that it does not intrude beyond those limits.

4. The question, then, is whether a given governmental inspection program related to certain activities is limited, by the statute or regulations governing the inspection, to intrusion upon the non-private aspects of an individual's or business' use of private property, and at the same time contains sufficient protection of the privacy rights which may exist concurrently in the same location. If so, neither a warrant nor any measure of probable cause is required to validate the inspection system, for no legitimate expectations of privacy are threatened.[11]

First, the scheme must assure that the inspection will be limited to those aspects of the location as to which privacy has not been retained; this can involve a spatial limitation, a temporal limitation, and a limitation upon what is dis-

[11] This Court has held that a warrantless search without probable cause can be "reasonable" and therefore valid under the Fourth Amendment even when there is clearly an intrusion into privacy, and has balanced the limited nature of a particular intrusion and the protections accorded by the statute in striking against the public interest in a particular search. (See, e.g., *South Dakota* v. *Opperman*, 428 U.S. 364; *United States* v. *Martinez-Fuerte*, 428 U.S. 543.) However, there is no need to apply a Fourth Amendment balancing test where the intrusion itself, and the protections accorded, are, as here, such that the legitimate privacy interests are necessarily protected by the inspection system. (See Note, *Government Access to Bank Records*, 83 Yale L.J. 1439, 1471 (1974).) If there is any intrusion into privacy here, it seems plain that it is minimal and outweighed by the need for uniform enforcement (see pp. 8-9, *supra*).

turbed or taken from the location. Here, as noted, the right to enter and inspect is limited to those areas where employees work and those machines and substances to which they are exposed. Nothing is taken from the premises except photographs of those locations and machines, and samples of those substances. (See Manual, at 77:2506-2507.) And, inspections are normally conducted during working hours.

Second, the inspection system must be set up so as not to threaten the concurrent privacy interests. For example, since the employers subject to OSHA have relinquished control over their premises only to the extent they have admitted employees and engaged in commerce, their Fourth Amendment right to be free from inspections directed toward general criminal activity, or toward civil penalties unrelated to the conduct of a business (see, e.g., *See, supra*), has been retained. OSHA contains several kinds of assurances that the intrusion will be limited to its permissible scope, and that the employer will know that it is so limited. OSHA inspectors have statutory authority *only* to inspect for OSHA violations; they are not generalized law enforcement officers.[12] Moreover, all covered employers are required to post notices which describe the Act generally and, in particular, state the right of OSHA inspectors, to "conduct jobsite inspections to insure compliance with the Act." (Official Occupational Safety and Health Poster, 2 BNA OSHA Reporter Reference File, at 41:1301; see 29 C.F.R. 1903.2.) Third, OSHA inspectors are required to present

[12] There has never been a situation, to our knowledge, in which information obtained by an OSHA inspector has been communicated to other law enforcement officials for use for other purposes, and the statute contains affirmative protection against use for certain purposes. (§ 15, 29 U.S.C. § 664.)

credentials before inspection and to outline the scope of the inspection to the employer. (Manual, at 77:2502, 2504.) [13] Thus, the employer is well aware of the purpose of the inspection, and of its limits, before it begins.

Finally, the scheme for selecting which locations are to be subject to routine inspections assures that impermissible motives unrelated to the purpose of the statute do not govern. The decision to inspect a particular location is made not by individual inspectors but by the Area Director. (Manual, at 77:2301.) And, the decision of the Area Director is governed by articulated principles, set out in advance, concerning coverage of certain industries and geographical locations, based on observed injury/illnesses rates. (*Id.*, at 77:2302.)

Thus, OSHA inspections intrude upon an employer's premises only to the degree that he has opened those premises to employees for commercial purposes. The purposes of the inspections are directly related to business regulation, and there are safeguards in the statute and regulations to assure that the inspections are performed only for their intended purpose and do not exceed their permissible scope. Consequently, the inspections do not intrude upon any privacy interest of the business, and no warrant is required.

II. If Warrants Are Constitutionally Necessary, The Statute Should Be Construed To Require Them.

The court below, without engaging in any analysis what-

[13] The credentials "state the officer's name, identify him as a compliance officer for the Department of Labor, and paraphrase the statutory authority for his entry. The officer's photo and signature appear on the credentials." (*Usery* v. *Godfrey Brake & Supply Service, Inc.*, 545 F.2d 52 (C.A. 8).) An employer may make a toll-free telephone call to verify the identification. (*Id.*, at 53.)

ever of the Fourth Amendment interests at stake, concluded that this case "must be controlled by *Camara* and *See*," decisions in which warrants were required before inspectors could conduct administrative searches without consent. (Jur. St. App. 9a.) The court went on to invalidate entirely the OSHA inspection scheme. Apparently, the three-judge court believed that requiring warrants would involve such a major revision in the scheme Congress contemplated as to be impermissible, even in the face of the usual rule that statutes are, insofar as possible, to be construed to render them constitutional. (*Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 348 (Brandeis, J., concurring).) It seems plain, however, that if, contrary to our analysis in Part I, the Court determines that there *is* a sufficient privacy interest to bring the Fourth Amendment warrant requirement into play, *Camara* and *See* would permit the Secretary to continue to enforce the statute essentially as Congress intended. The statute should therefore be construed if necessary to require an administrative warrant of the kind contemplated by *Camara* and *See*.

1. After holding that an individual may not be convicted of a crime for refusing entry to an inspector who had no warrant authorizing entry,[14] the Court in *Camara* and *See* went on to *reject* the proposition that in such circumstances, "warrants should issue only when the inspector possesses

[14] We note that we do not ascribe any significance to the fact that *Camara* and *See* both concerned prosecution for refusal to enter, while this case does not. Although the present practice of the Secretary is to obtain court orders if entry is refused by the employer, this regulation may not be required by the Act, which may permit civil penalties and, does, in some circumstances, provide criminal penalties, for resisting entry. (See §§ 17(a), 17(h), 29 U.S.C. §§ 666(a), 666(h); see also 18 U.S.C. § 111.)

probable cause to believe that a particular dwelling contains violations of the * * * standards prescribed." (*Camara*, 387 U.S., at 534; see also *See*, 387 U.S., at 545.) Rather, the Court held that since,

> "[t]he primary governmental interest at stake is to prevent even the unintentional development of conditions which are hazardous * * * the need for the inspection must be weighed in terms of these reasonable goals of code enforcement [and] 'probable cause' to issue a warrant [therefore] must exist if *reasonable legislative or administrative standards* for conducting an area inspection are satisfied with respect to a particular dwelling." (*Camara*, 387 U.S., at 535, 538 (emphasis supplied); see also *See*, 387 U.S., at 544-545.)

Thus "the judicial function envisioned in *Camara* did not extend to reconsideration of the basic agency decision to canvas an area," (*Almeida-Sanchez*, 413 U.S., at 283 (Powell, J., concurring)), and no individualized suspicion whatever is required to justify a warrant under the circumstances presented in *Camara*. (See *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 560-561.)

There is no reason to suppose that any higher standard of individualized cause is required for OSHA inspections than for municipal building code inspections of either residences or commercial premises. Just as the governmental interest at stake in *Camara* and *See* was based on the effect of one person's use of property upon the use of others and therefore required uniform compliance, so OSHA is premised upon a similar Congressional finding that "the chemical and physical hazards which characterize modern industry are not the problem of a single employer, a single industry, or a single state jurisdiction. The spread of industry and the mobility of the workforce combine to

make the health and safety of the worker truly a national concern." (S. Rep. No. 91-1282, 91st Cong., 2d Sess., (1970), 4.)

Similarly, as in *Camara*, "the only effective way to seek universal compliance * * * is through routine periodic inspections * * *." (387 U.S., at 536.) Congress obviously so determined, for it authorized entry "without delay," (§ 8 (a) 29 U.S.C. § 657(a)), created sanctions for advance notice of inspections (§ 17(f) 29 U.S.C. § 666(f); see also § 2(b)(10), 29 U.S.C. § 651(b)(10)), and required states to establish "a right of entry and inspection of all workplaces subject to the Act" before they could be permitted to assume enforcement of OSHA standards (§ 18(b)(3), 29 U.S.C. § 667(b)(3)). While Congress recognized that "the number of inspections which it would be desirable to have made will undoubtedly, for an unforeseeable period, exceed the capacity of the inspection force" (S. Rep. No. 91-1282, *supra*, at 12) and therefore gave the Secretary the right to require self-inspection (*id.*; see § 8(c)(1), 29 U.S.C. § 657 (c)(1)), this possibility was viewed as a "supplement to the Secretary's own inspections * * * between official inspections." (S. Rep. No. 91-1282, *supra*, at 12.) This insistence upon routine inspection authority was obviously justified, for, as in *Camara*, many conditions subject to regulation "are not observable from outside the building and indeed may not be apparent to the inexpert [employer or employees themselves]." (387 U.S., at 537.)

Moreover, the analysis in Part I, *supra*, surely demonstrates that if the *Camara* and *See* searches involved "a relatively limited invasion of * * * privacy" (*Camara*, 387 U.S., at 537), the invasion of privacy here is even more limited, if it exists at all. *Camara* involved a residential in-

spection; protection against governmental intrusions into homes is at the core of the Fourth Amendment. *See* involved a search of a locked warehouse accessible only to the owner, rather than an area into which employees come and go. And, OSHA contains assurance that the inspection will not exceed its proper bounds (see pgs. 15-17, *supra*), while the statutes in *Camara* and *See* contained no such protections. (See *Camara*, 387 U.S., at 526 & nn 1 & 2; *See*, 387 U.S., at 541 & n. 1.)

2. This Court has not had occasion, in *Camara* or *See* or any subsequent case, to delineate in other than general terms what kind of a showing must be made to a magistrate or judge to substantiate a warrant to conduct a periodic inspection. The general standards enunciated in *Camara* and *See*, and their application by lower federal courts, do, however, make clear that the standards for deciding upon routine inspections already used by the Secretary, albeit outside of a warrant procedure, would suffice to justify a warrant if presented to a magistrate or judge.

The standards enunciated by this Court for issuance of warrants for administrative searches begin with the principle that "[t]he agency's particular demand for access will of course be measured * * * against a flexible standard of reasonableness that takes into account the public need for effective enforcement of the particular regulation involved." (*See, supra*, 387 U.S., at 545.) The function of the magistrate in applying this principle is not to "review . . . policy matters" by a *de novo* appraisal of "legislative or administrative assessment of broad factors," but, instead, to determine whether the legislative or administrative standards are "reasonable [and] satisfied with respect to a particular [location]." (*Camara, supra*, 387 U.S., at 532,

538.) Enunciating the application of this principle to the municipal building code enforcement at stake in *Camara*, the Court noted that:

> "Such standards * * * may be based upon the passage of time, the nature of the building * * * or the condition of the entire area, but they will not necessarily depend upon the condition of the particular dwelling." (387 U.S., at 538)

The lower federal courts have had occasion, under statutes which expressly provide for a *Camara*-type warrant or were construed, after *Camara*, to require such a warrant, to review particular warrants for consistency with the *Camara/See* standards. For example, in *United States* v. *Goldfine*, 538 F.2d 815 (C.A. 9), a search was conducted under a warrant [15] obtained pursuant to § 510 of the Comprehensive Drug Abuse Prevention & Control Act of 1970, 21 U.S.C.

[15] The warrant read as follows:

"1. The above establishment is a pharmacy registered by and with the federal government to obtain, deliver and possess controlled substances pursuant to federal regulations.

2. This establishment has not been previously inspected.

3. The proposed inspection is undertaken to determine whether the establishment is conducting its business in controlled substances in compliance with the statutes and regulations under which it is authorized to do business.

4. The inspection will be conducted within regular business hours and in a manner designated by Title 21 U.S.C. § 880 and Title 21 C.F.R., Part 316.

5. The inspection will extend to the establishment and all pertinent equipment, containers, and records, as specified in Title 21 U.S.C. § 880.

6. Samples will be collected when necessary to reasonable inspection and receipt will be given therefor.

7. A return will be made to the Court upon completion of the inspection." (*Goldfine*, 538 F.2d, at 818 n.2.)

§ 880. That statute was passed after *Camara* and *See* and incorporated the definition of "probable cause" articulated in those cases:

> "For the purpose of this section, the term 'probable cause' means a valid public interest in the effective enforcement of this subchapter or regulations thereunder sufficient to justify administrative inspections of the area, premises, building, or conveyance, or contents thereof, in the circumstances specified in the application for the warrant." (21 U.S.C. § 880(d); see 21 C.F.R. § 316.)

The court determined that the warrant under review was more than sufficient to conform to the *Camara* principles. (538 F.2d, at 819).

Thus, the *Goldfine* court held that a demonstration that the establishment inspected is covered by the statute,[16] has not been previously inspected, and was inspected solely to determine compliance with a particular statute is sufficient. See also *United States* v. *Montrom*, 345 F. Supp. 1337 (D. Pa.), *aff'd*, 480 F.2d 918, 919 (C.A. 3); *United States* v. *Greenberg*, 334 F. Supp. 364 (D. Pa.). Similarly, in *United States* v. *Blanchard*, 495 F.2d 1329 (C.A. 1), the court, applying *Camara*, held that a warrant, issued under a statute construed after *Camara* to require a warrant, was sufficient where it was based on the assertion that "no

[16] Because OSHA covers only employers "engaged in a business affecting commerce who [have] employees" (§ 3(5)), 29 U.S.C. § 652(5), there may in a few instances be a question whether the establishment to be inspected is indeed covered by the Act. See *Matter of Rockland Memorial Park*, 540 F.2d 626 (C.A. 3). The function of the magistrate, however, would not be to determine whether any particular establishment is covered by the Act, but whether there is probable cause to believe it is; the merits of coverage could then be decided in enforcement proceedings. (*Id.*)

inspection of the defendants' premises had previously been made within the past twelve months." (495 F.2d, at 1331.)

Certainly, the Secretary could satisfy with respect to routine inspections the standard outlined in *Camara* and applied in *Goldfine* and *Blanchard*, were he given the opportunity. Mere passage of time or the fact that an establishment has not been previously inspected is apparently sufficient. Given the fact that OSHA has far fewer inspectors than the number it would need to guarantee inspection of all covered premises even once in ten years (see, e.g., 5 BNA Occupational Safety and Health Reporter 125 (June 26, 1975)), the Secretary could surely show, with respect to many establishments to be covered in a routine inspection, that they have not been inspected at all, or have not been inspected recently.

Further, the Secretary has endeavored to link frequency of inspection with the degree of hazard in particular industries, and the number of employees exposed. (Manual, at 77:2302.) Consideration of such factors is precisely analogous to consideration, in the *Camara* context, of the "nature of the building (e.g. a multi-family apartment house), or the condition of the entire area" (387 U.S., at 538), for it links inspection to the basic purposes of the statute—protecting as many people as possible from occupational injury or illness. Thus, the current "administrative standards • • • for conducting an [OSHA] inspection" (*Camara*, 387 U.S., at 538) are clearly reasonable, and the Secretary could obtain a warrant by showing that those standards "are satisfied with respect to a particular [business]." (*Id.*)[17]

[17] The statute and regulations also contain adequate assurances that the *scope* of the search will be reasonable (see pp. 15-17, *supra*), and could be paraphrased in the warrant so that the employer will have notice of the limits on the inspection.

3. This case does differ in one significant respect from *Camara* and *See*, as regards the obtaining of warrants. Congress, with justification, did insist that inspections must ordinarily be without advance notice. (See p. 20, *supra*.) Thus, the observance of the admonition in *Camara* that "it seems likely that warrants should normally be sought only after entry is refused" (387, U.S., at 539) would seriously compromise the inspection scheme.

The Court in *See*, however, specifically recognized that "since surprise may often be a crucial aspect of routine inspections of business establishments, the reasonableness of warrants issued in advance of inspection will necessarily vary with the nature of the regulation involved." (387 U.S., at 545 n.6.) Since the "nature of the regulation" here does necessitate surprise, to avoid short-term correction of work practices or physical hazards which do not represent the usual condition of the premises, obtaining warrants *ex parte* in advance ought to be permitted. Also, the particularity of description of the property to be inspected would then be limited to that which can be known in advance of physical perusal of the premises.

Obtaining warrants in advance of all routine inspections might, of course, constitute a serious administrative burden on the Secretary. However, we do not believe the burden would be such as to *fundamentally* alter the scheme Congress intended to implement. Inspection decisions are currently made in advance of the date of inspections, and scheduled by the Area Director (Manual, at 77:2301, 2501); the decision is made on the basis of certain information the Secretary collects regularly. (*Id.*, at 2302.) We assume that the work schedule and the pertinence of the applicable standards for inspection to each location is already evi-

denced by memoranda or forms; if not, they could be. Thus, obtaining warrants would require adding to the current scheduling system an affidavit in appropriate form for each establishment to be inspected on a given day and presenting groups of such affidavits to a magistrate or judge on a regular basis—once a week, for example.

4. Since the basic elements of the OSHA inspection scheme —periodic, surprise inspection with concentration upon particularly hazardous or large industries—could be conducted within the *Camara/See* framework if constitutionally necessary, this Court would not, as the lower court believed, have to "judicially redraft an enactment of Congress" (Jur. St. App. 10a) in order to interpret the Act to require warrants.

"[U]nder familiar principles of constitutional adjudication, [this Court's] duty is to construe the statute, if possible, in a manner consistent with the Fourth Amendment." (*Almeida-Sanchez, supra*, 413 U.S., at 272.) While Congress was insistent that the inspections be conducted routinely and without advance notice and may well have contemplated that they could be conducted without warrants, neither the language of the statute nor the legislative history *specifically* require that the inspections be without warrants. Indeed, one of the principal authors of the Act noted expressly that "in carrying out inspection duties under this act, the Secretary, of course, would have to act in accordance with applicable constitutional protections." (Legislative History, *supra*, at 1077 (remarks of Rep. Steiger).) Thus, if "to give the statute [the] reading [that no warrants are required] would call its constitutionality into serious question," the Court should "decline to read it as [permitting] * * * warrantless invasions of privacy." (*G.M. Leasing Corp., supra*, 45 L.W., at 4104.) Instead, the Court should read the statute as authorizing entry but silent on the question of whether warrants are to be obtained, and assume that Congress intended conformity with whatever the Fourth Amendment requires with respect to warrants.

The disposition of this case follows from the above analysis. While "it is undisputed that [the OSHA inspector] did not have any cause, probable or otherwise, to believe a violation existed" (Jur. St. App. 2a), it appears that neither the court which issued the inspection order nor the three-judge court which decided the constitutional question ever inquired into whether the Secretary could demonstrate, as *Camara* requires, not particularized cause but a reasonable scheme, applicable to Barlow's, Inc., for conducting routine inspection. It seems clear that the Secretary could justify this inspection on *Camara* grounds, and should, if such is constitutionally required, be given the opportunity, upon remand, to do so.

CONCLUSION

For the reasons stated above, the decision of the three-judge court should either be reversed outright on the ground that no warrant is required, or reversed and remanded to give the Secretary the opportunity to make the showing required to obtain a warrant.

Respectfully submitted,

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